Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **9th day of September, 2020** are as follows:

PER CURIAM:

2019-KO-00998 STATE OF LOUISIANA VS. KEDDRICK KENNON (Parish of Webster)

We reverse the court of appeal's decision in State v. Kennon, 52,661 (La. App. 2 Cir. 5/22/19), 273 So.3d 611, which found defendant's 60-year sentence as a second-felony offender was not excessive. Finding that sentence excessive, we vacate it. To restore the parties to the status quo ante, we also vacate the habitual offender adjudication, and we reinstate the original unenhanced sentences that were affirmed as amended in State v. Kennon, 50,511 (La. App. 2 Cir. 4/13/16), 194 So.3d 661, writ denied, 16-0947 (La. 5/19/17), 220 So.3d 747 - i.e., a term of 30 years imprisonment at hard labor for distribution, with the first two years to be served without parole eligibility, and a term of five years imprisonment at hard labor for possession, the two terms to be served consecutively. Finally, we remand to the district court for further proceedings consistent with the views expressed above.
REVERSED AND REMANDED.

Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4.

Johnson, C.J., concurs in part and dissents in part and assigns reasons.
Crichton, J., additionally concurs and assigns reasons.
Crain, J., dissents and assigns reasons.

09/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KO-00998

STATE OF LOUISIANA

versus

KEDDRICK KENNON

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF WEBSTER

PER CURIAM:[*]

The facts underlying these convictions are straightforward. In 2014, a police informant made two controlled drug purchases from defendant in Minden. The transactions were captured on hidden camera. On January 24, the informant purchased two small bags of cocaine from defendant with $350 provided by the police. The transaction occurred in front of the home of defendant's mother. On February 6, the informant purchased a small bag of cocaine and a small bag of what was described as methamphetamine from defendant, this time in defendant's home, with $350 provided by the police. The bag that was supposed to contain methamphetamine turned out to contain bunk.

A Webster Parish jury found defendant guilty of distribution of cocaine and possession of cocaine. In comparison to the facts, the procedural history after the verdicts is labyrinthine. The district court sentenced defendant to serve two terms of imprisonment at hard labor: 30 years and five years, to run consecutively. The court of appeal affirmed the convictions and sentences (as amended to reflect that the first two years of the 30-year sentence for distribution of cocaine are to be

[*] Retired Judge James Boddie, Jr., appointed Justice pro tempore, sitting for the vacancy in Louisiana Supreme Court District 4.

served without parole eligibility). *State v. Kennon*, 50,511 (La. App. 2 Cir. 4/13/16), 194 So.3d 661 (*Kennon-1*), *writ denied*, 16-0947 (La. 5/19/17), 220 So.3d 747.[1]

On June 3, 2016, the State filed a habitual offender bill of information, alleging that defendant is a fourth-felony offender with predicate felony convictions for distribution of cocaine, possession of cocaine, and attempted possession of cocaine with intent to distribute. Defendant admitted he is a second-felony offender (based on the attempted possession of cocaine with intent to distribute predicate) and received an agreed-upon sentence of 60 years imprisonment at hard labor. The district court, however, had vacated both sentences before it imposed the 60-year sentence.

Defendant filed a motion to correct an illegal sentence, which the district court denied. Because defendant received a single 60-year sentence despite being convicted of two crimes, the court of appeal granted defendant's application for supervisory writs. The court of appeal vacated the habitual offender sentence and remanded for resentencing. *State v. Kennon*, 52,343 (La. App. 2 Cir. 7/20/18) (unpub'd). On remand, the trial court reimposed the originally agreed-upon sentence of 60 years imprisonment at hard labor as a second-felony offender for distribution of cocaine. The district court also sentenced defendant to a concurrent term of five years imprisonment at hard labor for the possession of cocaine conviction.

The court of appeal affirmed the sentences. *State v. Kennon*, 52,661 (La.

[1] On November 17, 2017, in keeping with La.S.Ct. Rule IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, . . ."), this court declined to consider defendant's application for rehearing. Ordinarily, this would not merit mentioning. Here, however, it is pertinent to defendant's argument regarding the finality of his conviction, as discussed below.

App. 2 Cir. 5/22/19), 273 So.3d 611 (*Kennon-2*). The court of appeal found that it could review the sentence, although it was imposed pursuant to a plea agreement, because the district court informed defendant at his original habitual offender sentencing and at the resentencing that followed remand that he had 30 days to appeal the sentence.

The court of appeal then found defendant was correctly sentenced under the habitual offender statute, as it existed at the time defendant committed the underlying criminal act, and that a subsequent legislative amendment that reduced the sentencing range "is an improper metric to find a sentence excessive." *Kennon-2*, 52,661, p. 7, 273 So.3d at 617. The court of appeal noted that, although defendant agreed to receive the maximum sentence authorized for a second-felony offender, he could have received a mandatory life sentence if found to be a fourth-felony offender, as the State had originally alleged. While recognizing that the penalty range was reduced by a 2017 amendment to the Habitual Offender Law,[2] the court of appeal found the amendment applied prospectively only and did not constitute a reason to find defendant's sentence imposed under the pre-2017 law is excessive.[3] Finally, the court of appeal found defendant's sentence is not

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[2] The Habitual Offender Law, La.R.S. 15:529.1, was amended by 2017 La. Acts 282. With this amendment, the legislature did the following: it reduced the minimum habitual offender sentences for certain second, third, and fourth-felony offenders; it altered the criteria for mandatory life sentences for third and fourth-felony offenders; it shortened the cleansing period from 10 years to five years; and it expressly directed sentencing courts to consider whether mandatory minimums would be constitutionally excessive under the criteria set forth in *State v. Dorthey*, 623 So.2d 1276 (La. 1993).

If sentenced under La.R.S. 15:529.1 as amended by 2017 La. Acts 282, defendant would face a sentencing range of 20 to 60 years as a fourth-felony offender, and 10 to 60 years as a second-felony offender.

[3] The court of appeal made this determination before this court held in *State v. Lyles*, 19-00203 (La. 10/22/19), 286 So.3d 407, that the full provisions of 2017 La. Acts 282 apply to persons whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed before that date. The parties here dispute whether defendant's conviction became final

excessive. The court of appeal noted that defendant's criminal history reflects defendant's involvement in the drug trade, spans 20 years, and includes two parole revocations, before the court concluded:

> When viewed in the light of the harm done to society, the sentence the defendant agreed to, while the maximum allowed for a second felony offender, cannot be said to shock the sense of justice. The defendant has obviously failed to benefit from prior leniency afforded him in sentencing and has not been successfully rehabilitated despite the many opportunities given to him. As noted by the trial court, the defendant's drug activity has continued to pose a dangerous threat to the community. For these reasons, the agreed upon 60-year sentence has been shown to be meaningfully tailored to the culpability of this defendant and, accordingly, we affirm it.

Kennon-2, 52,661, p. 12, 273 So.3d at 619.

Defendant argues in this court that his 60-year habitual offender sentence is reviewable despite it being imposed originally pursuant to a plea agreement, and that it is excessive in violation of the prohibition against cruel, excessive, or unusual punishment contained in La. Const. Art. 1, § 20. The State takes the contrary views. For the reasons that follow, we find the 60-year sentence is both reviewable and excessive, and therefore we set it aside. However, because the sentence was negotiated as part of a plea agreement in which defendant admitted his status as a second-felony offender, we also set aside the habitual offender adjudication, we restore the parties to the status quo ante by reinstating the unenhanced sentences (30 years and 5 years, to run consecutively) that were affirmed as amended in *Kennon-1*, and we remand to the district court for further proceedings.

As a general matter, sentences imposed in accordance with plea agreements are unreviewable. La.C.Cr.P. art. 881.2(A)(2) ("The defendant cannot appeal or

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"on or after November 1, 2017" and thus whether defendant should be resentenced under the amended law in accordance with the holding of *Lyles*. That question is answered below.

seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea."); *State v. Curry*, 400 So.2d 614, 616 (La. 1981) ("The sentence . . . was the result of plea bargaining culminating in a plea of guilty with the sentence to be given understood and agreed to. Under these circumstances we believe there was no necessity of listing enumerated reasons and that the defendant cannot complain of excessive length."). Defendant argues this general prohibition does not apply because he was not informed he was waiving his right to appellate review of the sentence, and he was informed of the time in which to appeal.

The record shows that during the original plea colloquy held on August 1, 2016, the district court advised defendant that he was waiving the right to appeal, but, after imposing sentence, the court also informed defendant he had 30 days to appeal his sentence. On remand after the court of appeal set aside the sentence, the district court once again informed defendant that he had 30 days to appeal the sentence after resentencing him. Citing jurisprudence within its circuit, the court of appeal found the district court's statements sufficient to preserve defendant's right to appellate review of his sentence. *Kennon-2*, 52,661, p. 5, 273 So.3d at 616, citing *State v. Thomas*, 51,364 (La. App. 2 Cir. 5/17/17), 223 So.3d 125, *writ denied*, 17-1049 (La. 3/9/18), 238 So.3d 450; *State v. Brown*, 50,138 (La. App. 2 Cir. 9/30/15), 181 So.3d 170; *State v. Fizer*, 43,271 (La. App. 2 Cir. 6/4/08), 986 So.2d 243. Under that jurisprudence, "when the right to appeal has been mentioned by the district court during the plea colloquy, even though there is an agreed sentence or sentence cap, the defendant's sentence may be reviewed." *Thomas*, 51,364, p. 9, 223 So.3d at 130.

While the district court's advisements of the time to appeal were made after

the sentences were imposed and did not occur during either plea colloquy, there is an even clearer indication here that the parties and the court intended for defendant to be able to seek appellate review of the sentence. On remand, the district court appointed a public defender to represent defendant and to advance arguments with regard to the sentence on defendant's behalf. Although the district court ultimately rejected those arguments and resentenced defendant to the same 60-year term of imprisonment, the court clearly stated that it wanted to preserve the record for appellate review.

Defendant was resentenced after the Habitual Offender Law, La.R.S. 15:529.1, was amended by 2017 La. Acts 282. Among the arguments advanced by defendant before he was resentenced is a claim that he should be resentenced under the amended law. The district court and the court of appeal rejected this claim but did not have the benefit of this Court's decision in *State v. Lyles*, 19-0203 (La. 10/22/19), 286 So.3d 407, which was decided after. Defendant now argues he is entitled to be resentenced under *Lyles* because his conviction was not yet final until after November 1, 2017, because appellate review of the habitual offender sentence was ongoing. The State disagrees.

In *State v. Lyles*, this court considered whether the defendant's habitual offender status and sentence are governed by La.R.S. 15:529.1 as it existed at the time of the commission of the crime in 2015, as it was amended by 2017 La. Acts 282, or as it was amended by 2018 La. Acts 542. Defendant in *Lyles* relied on Section 2 of Act 282, which provides, "This Act shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017." The State, however, relied on a subsequent amendment to the Habitual Offender Law in 2018 La. Acts

542 to argue that the legislature subsequently clarified its intent that the version of the Habitual Offender Law in effect at the time of the crime applied. This court found that the language of Section 2 of Acts 282 is unequivocal, and therefore, "For persons like defendant, whose convictions became final on or after November 1, 2017, and whose habitual offender bills were filed before that date, the full provisions of Act 282 apply." *Lyles*, 19-00203, p. 6, 286 So.3d at 411.

Here, the parties dispute whether defendant's conviction is final for purposes of *Lyles* and Section 2 of Act 282. First, defendant contends his conviction does not become final until his habitual offender adjudication and sentence become final. Second, defendant proposes in the alternative that, if his underlying conviction is final, it became final when this court denied his application for rehearing on November 17, 2017. This latter contention can be quickly dismissed because it ignores the fact that this court did not *deny* the application for rehearing; this court *did not consider* the application because it was prohibited from doing so by La.S.Ct. Rule IX § 6 ("An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, . . ."). Therefore, defendant cannot avail himself of La.C.Cr.P. art. 922(D) to stave off finality of the conviction.[4]

To accept defendant's view that his conviction does not become final until his habitual offender adjudication and sentence become final, despite the fact that appellate review of his conviction has been completed, would require the court to read "offenders whose convictions became final on or after November 1, 2017" in Section 2 of Act 282 as "offenders whose convictions and sentences became final"

[4] Code of Criminal Procedure art. 922(D) provides (with emphasis added): "If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court *denies* the writ."

instead. Just as we were bound by this unequivocal language in *Lyles* to find that defendant was entitled to be sentenced under La.R.S. 15:529.1 as amended by 2017 La. Acts 282, we are bound by it here to find this defendant is not.

The question presented is one of statutory interpretation, which begins "as [it] must, with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 143, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995). "Unequivocal provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning." *State v. Oliphant*, 12-1176, p. 5 (La. 3/19/13), 113 So.3d 165, 168; *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) ("In any event, canons of construction are no more than rules of thumb to help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). Just as we did in *Lyles*, we find the language of Section 2 of Act 282 is unequivocal, and therefore not subject to further judicial construction.

While the situation here is complicated by the bifurcated appeals that resulted from the State's decision to pursue recidivist sentence enhancement during the pendency of the first appeal, we think it sufficient to find *Lyles* does not apply here because a conviction is a conviction, while this court has consistently found a habitual offender proceeding is "merely part of sentencing." *State v. Langendorfer*, 389 So.2d 1271, 1276–77 (La. 1980). It is well-settled that, "A defendant is not convicted of being a habitual offender. Rather, a defendant is adjudicated as a

habitual offender as a result of prior felony convictions. The sentence to be imposed following a habitual offender adjudication is simply an enhanced penalty for the underlying conviction." *State v. Parker*, 03-0924, p. 15 (La. 4/14/04), 871 So.2d 317, 325–326. The only appellate review ongoing here pertains to defendant's habitual offender sentence. Direct review of the conviction itself ceased before November 1, 2017.

Having taken a winding route required by the procedural history, we finally reach the central question presented: is the 60-year sentenced imposed on this defendant as a second-felony offender prohibited by La. Const. Art. 1, § 20? Defendant contends that it is for the following reasons. He has never been convicted of a crime of violence, and his non-violent criminal activity has been sporadic, as reflected in the predicate felonies alleged in the habitual offender bill of information, which convictions occurred in 1993, 1995, and 2004. The 60-year sentence is the maximum, which is reserved for the "worst kind of offender," *State v. Quebedeaux*, 424 So.2d 1009, 1014 (La. 1982), which he is not. Because he was 43 years old when sentenced as a habitual offender, the 60-year term of imprisonment is effectively a life sentence, unless he is paroled. Although the 2017 amendment to the habitual offender law may not apply, the legislature's changed views with regard to the appropriate sentencing ranges should still be considered. *See State v. Clark*, 391 So.2d 1174, 1176 (La. 1980) ("Inherent in mitigatory changes in penalty provisions of an offense is a legislative determination that the present law is inappropriate . . . and that the lesser penalty is sufficient to meet the legitimate ends of the criminal law.").

Finally, defendant cites recent decisions in which lengthy sentences imposed for non-violent drug crimes have been found to be excessive, and in particular

State v. Mosby, 14-2704 (La. 11/20/15), 180 So.3d 1274. In *Mosby*, this court found that a 30-year sentence imposed on a non-violent, 72-year-old, wheelchair-bound, fourth-felony offender with a history of using and distributing cocaine was grossly out of proportion to the severity of the offense, amounted to nothing more than purposeful imposition of pain and suffering, was unconstitutional, and, indeed, unconscionable.

The 60-year sentence here is the maximum authorized under the Habitual Offender Law, as it existed at the time of the crime. A permissible sentence under Louisiana's habitual offender sentencing scheme may still violate a defendant's constitutional right not to be subjected to excessive punishment. *State v. Sepulvado*, 367 So.2d 762 (La 1979). A sentence is unconstitutionally excessive under Article 1, § 20 of the Louisiana Constitution if it makes no measurable contribution to acceptable goals of punishment or amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. *State v. Dorthey*, 623 So.2d 1276 (La.1993); *State v. Johnson*, 709 So.2d 672 (La 1998); *see also State v. Bonanno*, 384 So.2d 355, 358 (La. 1980) ("To determine whether the penalty is grossly disproportionate to the crime we must consider the punishment and the crime in light of the harm to society caused by its commission and determine whether the penalty is so disproportionate to the crime committed as to shock our sense of justice."), citing *State v. Beavers*, 382 So.2d 943 (La. 1980).

For the reasons urged by defendant, we find the maximum 60-year sentence imposed under the Habitual Offender Law on this defendant is grossly out of proportion to the crime and to defendant's non-violent and sporadic criminal history. While defendant may have unsuccessfully availed himself of the

opportunity for reform twice previously and continued to sell small quantities of cocaine, imposing a de facto life sentence—which makes no measurable contribution to acceptable goals of punishment and amounts to nothing more than the purposeful imposition of pain and suffering—is prohibited by Article 1, § 20 of the Louisiana Constitution.

However, defendant here agreed to the imposition of an excessive sentence as part of a plea agreement negotiated with the State in which he admitted his status as a second rather than a fourth-felony offender. While we do not believe a defendant can simply acquiesce in the imposition of cruel, excessive, or unusual punishment prohibited by La. Const. Art. 1, § 20, and by doing so relieve the judiciary of its "perpetual role in reviewing sentences for constitutional excessiveness," *State v. Dorthey*, 623 So.2d 1276, 1281 n.11 (La. 1993)—which role has been recognized by the legislature, and even made a statutory component of the Habitual Offender Law, *see* La.R.S. 15:529.1(I)—after finding this agreed-upon sentence is excessive, we decline to alter the terms of only one-half of a bargain.

As a general matter, in determining the validity of agreements not to prosecute or of plea agreements, the courts generally refer to rules of contract law, although a defendant's constitutional right to fairness may be broader than his or her rights under the law of contract. *See State v. Louis*, 94-0761 (La.11/30/94), 645 So.2d 1144, 1148–49 (court "refer [s] first to the law of contracts for application by analogy," but founds its analysis on "considerations of constitutional fairness"), citing *Ricketts v. Adamson*, 483 U.S. 1, 16, 107 S.Ct. 2680, 2689, 97 L.Ed.2d 1 (1987); *State v. Lewis*, 539 So.2d 1199, 1204–05 (La.1989) (commercial contract law only a point of departure in construing a plea bargain agreement). Here, there

was a valid plea agreement. The State offered a reduction in the grade of defendant's status as a habitual offender and in exchange defendant agreed to the imposition of a 60-year term of imprisonment. It is our constitutional duty to set aside that agreed-upon sentence. However, we do not find that due process or principles of fundamental fairness require that defendant retain the advantage of the bargain after the negotiated sentence falls. Instead, the entire agreement should be rescinded and the parties restored to their statuses before the agreement to renegotiate.

Accordingly, we reverse the court of appeal's decision in *State v. Kennon*, 52,661 (La. App. 2 Cir. 5/22/19), 273 So.3d 611, which found defendant's 60-year sentence as a second-felony offender was not excessive. Finding that sentence excessive, we vacate it. To restore the parties to the status quo ante, we also vacate the habitual offender adjudication, and we reinstate the original unenhanced sentences that were affirmed as amended in *State v. Kennon*, 50,511 (La. App. 2 Cir. 4/13/16), 194 So.3d 661, *writ denied*, 16-0947 (La. 5/19/17), 220 So.3d 747—i.e., a term of 30 years imprisonment at hard labor for distribution, with the first two years to be served without parole eligibility, and a term of five years imprisonment at hard labor for possession, the two terms to be served consecutively. Finally, we remand to the district court for further proceedings consistent with the views expressed above.

REVERSED AND REMANDED

SUPREME COURT OF LOUISIANA

No. 2019-KO-00998

STATE OF LOUISIANA

VS.

KEDDRICK KENNON

On Writ of Certiorari to the Court of Appeal, Second Circuit,
Parish of Webster

JOHNSON, C.J., concurs in part and dissents in part and assigns reasons:

I concur only with the majority's holding that a sentence of sixty years in prison without parole for selling a small amount of cocaine is constitutionally excessive. I respectfully dissent from the court's determination to reinstate the original sentences. In my view, reinstating even the original unenhanced sentences of thirty years and five years still violates the Eighth Amendment's prohibition on cruel and unusual punishment and is constitutionally excessive under Article I, Section 20 of the Louisiana Constitution.

Mr. Kennon's sentence should only reflect the actual and relative harm done by his act. And in my view, it is time our proportionality review for constitutional excessiveness under *Solem v. Helm*, 463 U.S. 277, 284 (1983) took into account the statistical evidence that minorities are disproportionately targeted, arrested, prosecuted, and sentenced as habitual offenders for drug crimes.

The record clearly demonstrates that this defendant was specifically targeted for arrest and prosecution. This is not even the usual case where a confidential informant called police to report drug sales. Instead an inmate working at the Minden Police Department wanted to make money for himself and offered to set Defendant up to be charged with a crime.

> While working as a trustee for the Minden Police Department and in anticipation of his upcoming release from prison, Donald Fields advised Captain Dan Weaver that he could purchase illegal narcotics from Keddrick Kennon. Fields volunteered to help the police because he needed money to support himself once out of prison. Captain Weaver informed Fields that, as a confidential informant, he would receive $1,500 each time he purchased illegal narcotics from Kennon.

State v. Kennon, 50, 511 (La. App. 2 Cir. 4/13/16), 194 So.3d 661, 663. Mr. Fields attempted several drug purchases and, as a result, Mr. Kennon was convicted of one count of selling $350 worth of cocaine (occurring on January 24, 2014) and the lesser count of possession of cocaine (occurring on February 6, 2014).[1] Mr. Kennon was 43 years old when convicted. His sentence of sixty years without parole was authorized under Louisiana's habitual offender law, La. R.S. 5:529.1. All of Mr. Kennon's previous convictions have been relatively minor drug offenses. He has never been charged with, or convicted of, a violent crime. According to evidence offered at sentencing, Mr. Kennon is battling an addiction himself to a prescribed opioid (Lortab). *State v. Kennon*, 194 So.3d 661, 667 (2016), *R. 836*. In his youth, he raised his younger brother and sister because his mother worked two or three jobs. *Id.* According to testimony at his bail hearing, until this arrest in 2014, Mr. Kennon himself was the main family breadwinner for his wife and their seven-year-old daughter, working six days a week, eleven hours per day, earning thirteen or fourteen dollars per hour at a pipe-laying company. *R. 174-75.*

Data is consistently clear that White and Black Americans sell and use drugs at roughly the same rates.[2] Yet authorities are nearly four times more likely to arrest

[1] The record does not contain the exact amount of cocaine Mr. Kennon was alleged to have sold to Fields. However, each transaction for which Defendant was convicted was worth $350. According to the United Nations Office on Drugs and Crime, street prices in the United States for a gram of cocaine in 2014 averaged around $100. U.N.O.D.C, *Heroin and Cocaine Prices in Europe and USA*, https://dataunodc.un.org/drugs/heroin_and_cocaine_prices_in_eu_and_usa-2017 (updated 2018).

[2] United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse*,

and prosecute African Americans for drug offenses than their White counterparts.[3] In Louisiana, the largest racial disparity in the prison population is in those serving habitual offender sentences for non-violent drug offenses. African Americans comprise 32% of the state's population, but according to Louisiana Department of Corrections data for 2019, 85.7% of prisoners with habitual offender sentences for drug offenses are Black. Mr. Kennon happens to be one of them.

The habitual offender sentencing provisions of La. R.S. 5:529.1 are discretionary. A district attorney is never required to file a habitual offender bill to seek a more severe sentence. But the disproportionate number of Black prisoners with habitual offender sentences for illicit drug crimes demonstrates that—statistically—prosecutors exercise their discretion to enhance sentences disproportionately against African Americans.[4] And while we are not alone,[5] we should not be less concerned with the racial disparities created by Louisiana prosecutors' use of the habitual offender law simply because inequitable results from this discretionary tool are found throughout the country.

A sentence is unconstitutionally excessive under Article 1, § 20 of the Louisiana Constitution if it makes no measurable contribution to acceptable goals of punishment or amounts to nothing more than the purposeful imposition of pain and

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https://www.samhsa.gov/data/data-we-collect/nsduh-national-survey-drug-use-and-health (updated annually).

[3] Rothwell, J., *Drug offenders in American prisons: The critical difference between stock and flow*, Brookings Institution (2015), https://www.brookings.edu/blog/social-mobility-memos/2015/11/25/drug-offenders-in-american-prisons-the-critical-distinction-between-stock-and-flow/.

[4] Individual prosecutors do not need to be motivated by racial animus or discriminatory intent in making charging decisions for implicit biases to manifest in clear racial disparities. See generally, Jerry Kang and Kristin Lane, *Seeing Through Colorblindness - Implicit Bias and the Law*, 58 UCLA L. Rev. 465 (2010).

[5] Numerous studies suggest prosecutors disproportionately target Black men convicted of drug and property offenses with habitual offender sentences. *See, e.g., Stephens v. State*, 456 S.E.2d 560, 561 (1995) (though African Americans make up 27% of Georgia's population, they made up 98.4% of people serving life sentences for drug offenses); Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 Criminology 3, 481-511 (1998).

suffering and is grossly out of proportion to the severity of the crime. *State v. Dorthey*, 623 So.2d 1276 (La.1993); *State v. Johnson*, 709 So.2d 672 (La 1998); *see also State v. Bonanno*, 384 So.2d 355, 358 (La. 1980) ("To determine whether the penalty is grossly disproportionate to the crime we must consider the punishment and the crime in light of the harm to society caused by its commission and determine whether the penalty is so disproportionate to the crime committed as to shock our sense of justice."), citing *State v. Beavers*, 382 So.2d 943 (La. 1980). The Eighth Amendment to the Constitution prohibits cruel and unusual punishments, including not just barbaric punishments, but also those that are disproportionate to the crime committed. *Weems v. United States*, 217 U.S. 349 (1920); *Solem v. Helm*, 463 U.S. at 284. A review of whether a sentence is disproportionate under the Eighth Amendment "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292.

First, under both Louisiana excessiveness review and Eighth Amendment proportionality analysis, the gravity of the offense considers the absolute and relative harm done. "[W]e must consider the punishment and the crime in light of the harm to society caused by its commission." *Bonanno*, 384 So.2d at 358. In absolute terms, Mr. Kennon was convicted of a small drug sale; likely no more than five grams of cocaine.

Further, in relative terms, selling a few grams of cocaine pales in comparison to the lethal harm caused by those responsible for the opioid epidemic raging through North Louisiana, which includes Webster Parish where Mr. Kennon was convicted.[6]

[6] A northwest Louisiana publication recently noted that there is "a growing opioid crisis in North Louisiana." *Inaugural North Louisiana Rural Opioid Summit Held in Claiborne Parish*, BIZ Magazine, Feb. 2, 2020, https://bizmagsb.com/2020/02/20/inaugural-north-louisiana-rural-opioid-summit-held-in-claiborne-parish/. Webster Parish has a population of approximately 30,135 adults. According to data from the Drug Enforcement Agency's Automation of Reports and

In the United States, cocaine kills one quarter the number of people every year that opioids do.[7] Yet—perhaps due to the holistic, public health response to the opioid crisis taken by authorities[8]—the corporate executives of pharmaceutical companies and the medical doctors and pharmacists who are largely responsible for unleashing these highly addictive drugs into the community are noticeably absent from Louisiana's prisons.[9] The harm done by Mr. Kennon, compared to greater harms committed by others who remain unpunished, should be a relevant consideration in our proportionality review.

Second, and relatedly, Mr. Kennon's sentence in comparison to other people committing similar crimes is extreme. *Solem*, 463 U.S. at 292. Cocaine use is prevalent on college campuses across America. Yet it would shock the conscience of average Americans to see an affluent college student, who sells a few grams of cocaine to friends, convicted and imprisoned for a long term of hard labor. But

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Consolidated Orders System, in 2012, 1,882,760 prescription opioid pain pills moved through Webster Parish; 62 pills per year for *every single person over 18*. *See* https://data.cincinnati.com/pain-pills/louisiana/webster-parish/22119/.

[7] Hedegaard, H., Bastian, B., Trinidad, J., Spencer, M.R., and Warner M., *Regional Differences in the Drugs Most Frequently Involved in Drug Overdose Deaths: United States, 2017*, 68 National Vital Statistics Reports 12 (Oct. 25, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_12-508.pdf.

[8] In February of this year, while Webster Parish prosecutors were preparing their brief in defense of Mr. Kennon's sixty-year sentence, the Webster Parish Sheriff's office attended the inaugural North Louisiana Rural Opioid Summit, which was designed to "discuss holistic strategies for success in treatment and prevention." At the Summit:

> [t]opics included: the origin of the problem, strategies for combatting addiction, treatment as an alternative to incarceration, overprescribing, battling illegal distribution, new drugs in the region, community education, how to change public perception of addiction, Medically-Assisted Treatment (MAT), strategies for success in the treatment process, youth education and prevention programs, Naloxone distribution, and personal testimonies from people in recovery and from family members who lost loved ones to addiction.

BIZ Magazine, *supra*, at n. 6.

[9] Data from the United States Department of Health and Human Services shows that over 80% of prescription opioid abusers obtained their opioids from a doctor's prescription or from a friend or family member who was prescribed the opioid.

despite committing an identical transgression to the one Mr. Kennon is convicted of, one is targeted by law enforcement, and one is not.

Because drug laws and habitual offender sentencing provisions have been disproportionately used against African Americans, we exacerbate and normalize this disparity if we ignore it in our proportionality analysis under the Eighth Amendment. Therefore, when we follow the Supreme Court's instruction to consider, in our proportionality analysis, "the sentences imposed on other criminals in the same jurisdiction," we should tailor our consideration to counteract the disproportionate manner in which such laws are enforced against African Americans. Our proportionality analysis should not simply compare Mr. Kennon's sentence to other draconian sentences given to African Americans targeted by police and prosecuted to the maximum by prosecutors, e.g., *State v. Mosby*, 14-2704, p. 1 (La. 11/20/15), 180 So.3d 1274; *State v. Arceneaux*, 18-0642 (La. App. 5 Cir. 4/24/19), 271 So.3d 362. Such a comparison distorts reality. Rather our analysis should compare Mr. Kennon to "other criminals" who have committed the same offense without regard to whether they have been targeted by law enforcement and convicted. When viewed this way, even a thirty-year prison sentence should shock the conscience.

I recognize that "[t]he legislature has sole authority under the Louisiana Constitution to define conduct as criminal and provide penalties for such conduct. La. Const. art. III, § 1." *State v. Kelly,* 95–2335, p. 1 (La.2/2/96), 666 So.2d 1082, 1083 (Calogero, C.J., concurring). But nothing prevents reviewing courts from taking into account the unequal enforcement of the law by police and prosecutors against a distinctive group—in this case African American men—when assessing whether a sentence is constitutionally excessive. For these reasons, I dissent from all but the holding that Mr. Kennon's current sixty-year sentence is constitutionally excessive.

09/09/20

SUPREME COURT OF LOUISIANA

No. 2019-KO-00998

STATE OF LOUISIANA

VS.

KEDDRICK KENNON

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Webster

CRICHTON, J., additionally concurs and assigns reasons

I agree with the per curiam's finding that the defendant's sixty-year sentence in this case is unconstitutionally excessive under La. Const. Art. I, §20, and should therefore be vacated and set aside. As the per curiam notes, the record reflects the sentence imposed is grossly disproportionate to the defendant's non-violent criminal history. As such, it cannot stand.

In recent years, this Court has begun confronting the continued use of the habitual offender bill and, where its application can result in excessive sentences. As I have previously noted, while use of the bill is legally available to prosecutors under appropriate circumstances, the resulting sentence must be able to withstand constitutional scrutiny upon review. In other words, merely because a district attorney can file a multiple offender bill of information does not mean that he or she should do so. Furthermore, just because a district attorney does so and the court accordingly adjudicates multiple offender status does not mean that a downward departure might not be warranted. *State v. Martin*, 19-1087 (La. 10/1/19), 280 So.3d 128, *writ denied*, (Crichton, J., additionally concurring, citing *State v. Ellison*, 2018-0053, p. 6 (La. 10/29/18), *writ denied*, 255 So.3d 568, 572 (Crichton, J., additionally concurring) ("[U]se of the Habitual Offender Law by prosecutors should be cautiously exercised with reasonable discretion."); *State v. Moore*, 18-130 (La.

1/14/19), 261 So.3d 766 (Crichton, J., additionally concurring) ("[T]he sentence of 20 years hard labor as a multiple offender, where the defendant has no convictions of crimes of violence and the conviction at issue arises from marijuana charges, is excessive."); *State v. Guidry*, 2016-1412 (La. 3/15/17), 221 So.3d 815, 831 (Crichton, J., additionally concurring) ("[T]he abusive frequency with which a de minimis number of jurisdictions invoke habitual offender laws against non-violent actors appears to do little to protect the people of Louisiana, and depletes the already scarce fiscal resources of this state."); *State v. Hickman*, 17-142 (La. 9/29/17), 227 So.3d 246, *writ denied*, (Crichton, J., additionally concurring) (. . . . "[U]nder an appropriate set of facts, I believe a trial court can impose a downward departure for certain non-violent offenses.") (internal citations omitted); *State v. Hagans,* 2016-0103, p. 1 (La. 10/17/16), 202 So.3d 475, *writ denied*, (Crichton, J., concurring) (noting the trial judge's downward departure to a lesser sentence for a small amount of cocaine was within her great discretion under *State v. Dorthey*, 623 So.2d 1276 (La. 1993)); *State v. Ladd*, 14-1611 (La. 3/27/15), 164 So.3d 184 (Crichton, J., concurring for reasons assigned by Knoll, J., agreeing with the Court's remand for resentencing and, noting the twenty-year sentence imposed for a non-violent defendant was harsh). In accord with my views expressed in the aforementioned cases, I concur with the per curiam's finding that, under the facts of this case, defendant's sixty-year sentence as a habitual offender, which essentially amounts to a life sentence, is excessive.

While I agree that the record here does not support the imposition of a sixty-year sentence, I write separately to note my view that this Court should also offer the district court guidance, as it has on other occasions, as to the maximum sentence it can impose under these particular circumstances. Specifically, if defendant is again adjudicated as a habitual offender after remand, the trial court shall impose a sentence that would not be grossly disproportionate to the offense and constitute

excessive punishment prohibited by Article 1 § 20 of the Louisiana Constitution. *See generally State v. Telsee*, 425 So.2d 1251 (La. 1983).

As this court noted in *Telsee*,

> [I]nsight into the nature of the offender and his offense may be gained by asking, for example, whether (1) there is undue risk the defendant will commit another crime, (2) the defendant needs to be institutionalized, (3) a lesser sentence will deprecate the seriousness of defendant's crime, (4) defendant's conduct caused or threatened harm, (5) defendant has a criminal record, (6) defendant will respond to rehabilitation. *See* La.C.Cr.P. art. 894.1.
>
> Another factor is comparison of the defendant's punishment with the sentences imposed for similar crimes by the same court and other courts.

Telsee, 425 So.2d at 1253–54. Applying those factors here and under La. C.Cr.P. art. 529.1, I believe the record before us, and in particular defendant's non-violent criminal history, can only support a sentence of no more than thirty years imprisonment at hard labor for distribution of cocaine, regardless of whether defendant is ultimately sentenced as a second or fourth-felony offender. *Ladd, supra*; *State v. Ross*, 15-1113 (La. App. 4 Cir. 12/21/16), 207 So.3d 511, *writ denied*, 17-0394 (La. 9/22/17), 227 So.3d 826; *State v. Johnson*, 16-0259 (La. App. 4 Cir. 12/21/16), 207 So.3d 1101, *writ denied*, 17-0119 (La. 2/2/18), 233 So.3d 616; *State v. Dowell*, 16-0371 (La. App. 4 Cir. 8/10/16), 198 So.3d 243. This is in harmony with not only this Court's recent focus on multiple offender sentences that run afoul of Article 1 § 20 of the Louisiana Constitution, but also with the legislature's 2017 amendment to the Habitual Offender Law, La. R.S. 15:529.1, by Acts 282. As noted by the per curiam, the legislature amended the statute to not only reduce sentences for certain second, third, and fourth-felony offenders, but also to instruct sentencing courts to consider whether mandatory minimums would be constitutionally excessive under the criteria set forth in *State v. Dorthey*, 623 So.2d 1276 (La. 1993).

Finally, I also write separately to highlight the paramount importance of strict adherence to the record on appellate review and the duty imposed upon us to limit

our review to only the evidence in the record before us. "It is well-settled that this Court will only decide cases on the record before us." *State in Interest of K.L.A.,* 2014-1410 (La. 6/30/15), 172 So. 3d 601, 606, citing La. C.C.P. art. 2164 ("The appellate court shall render any judgment which is just, legal, and proper **upon the record on appeal**.") (emphasis added); *see also State v. Manning,* 2003-1982 (La. 10/19/04), 885 So. 2d 1044, 1063, n. 5 (the Court declining to consider defendant's references to material outside of the record, stating it is bound to consider only those exhibits in the record, citing *State v. Hilaire*, 216 La. 972, 45 So.2d 360, 363 (1950) (in criminal cases, this Court, as a court of appellate jurisdiction, is bound by the record)). In light of these principles, in my view, the concurrence in part and dissent in part goes considerably beyond the facts and record on appeal and is inconsistent with the rationale of La. C.C.P. art. 2164 and our jurisprudence. *See* Sanders, Joe W., "The Role of Dissenting Opinions in Louisiana," La. L. Rev. Vol. XXIII 673, June 1963.

The Court's ruling today is an example of corrective measures with regard to the misuse of the State's habitual offender adjudication and sentencing regime in certain jurisdictions. However, I believe it is important to recognize that this defendant received his sentence because of his convictions for five felony crimes and not because members of the judiciary involved in this case deviated from their constitutional duty to apply the law impartially to the facts in the record.

SUPREME COURT OF LOUISIANA

NO. 2019-KO-0998

STATE OF LOUISIANA

VERSUS

KEDDRICK KENNON

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF WEBSTER

CRAIN, J., dissenting.

To get what he asked for – setting aside his agreed-to sentence – defendant is given exactly what he carefully did not ask for – setting aside his plea agreement. Defendant's reluctance is understandable given his sentencing exposure as a fourth felony offender. The majority correctly recognizes defendant cannot have it both ways, that is, have his agreed-to sentence reviewed but not the validity of his plea agreement. Rather than simply rejecting defendant's effort to do so, the majority delivers a remedy he did not seek. A remedy contrary to express law and this court's precedent.

An agreed-to sentence imposed as part of a valid plea agreement is not subject to judicial review. La. Code Criminal Procedure article 881.2A(2); *State v. Young*, 96-0195, (La. 10/15/96), 680 So. 2d 1171. Article 881.2A(2) is clear: "The defendant cannot appeal or seek review of a *sentence* imposed in conformity with a *plea agreement* which was set forth in the record at the time of the plea." (Emphasis added.) This article codifies the constitutional declaration that the right to judicial review may be waived. *See* La. Const. Art. 1, §19. Until now that principle has

been routinely applied by this court to deny requests to review sentences imposed pursuant to a plea agreement.[1]

The *Young* court rejected an effort to confine the scope of Article 881.2A(2) to certain types of plea agreements. In a straightforward application of the article, this court stated:

> Defendant voluntarily and with the assistance of counsel decided to enter into a plea agreement so he would not be subjected to a term of imprisonment longer than a total of thirty years for all of the charges against him. Defendant was sentenced within the agreed upon range. In fact, defendant was sentenced to a term of imprisonment which was less than the sentencing cap he pled guilty under. Therefore, we find La.C.Cr.P. art. 881.2(A)(2) precludes defendant from appealing his sentence imposed in conformity with a plea agreement which was set forth in the record at the time of his plea.

State v. Young, 680 So. 2d at 1175.

The majority alludes to, but never expressly approves, court of appeal jurisprudence holding that a defendant's "right to appellate review of his sentence" is "preserved" if the trial court informs the defendant during the plea colloquy that he can appeal the sentence. Here, the trial court announced the appeal delays *after* the plea was accepted. A post-sentence statement granting a non-existent appeal right is harmless error.

In order to review this sentence, the majority finds the appointment of counsel at resentencing "an even clearer indication here that the parties and the court intended for the defendant to be able to seek appellate review of the sentence." "Parties" must include the state, and our record does not reflect such an agreement by the state. The state has consistently sought the straightforward application of Article 881.2A(2). Neither the parties, the trial court, nor this court can create an appeal right expressly prohibited by Article 881.2A(2).

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[1] *See e.g. State ex rel. Payton v. State*, 16-1795 (La. 2/9/18); 235 So. 3d 1098 (*per curiam*); *State ex rel. Rainey v. State*, 16-1439 (La. 10/27/17); 228 So. 3d 193, 194 (*per curiam*); *State ex rel. Banks v. State*, 16-1430 (La. 10/27/17); 228 So .3d 195 (*per curiam*); *State ex rel. Jackson v. State*, 15-1498 (La. 9/23/16); 200 So. 3d 339 (*per curiam*).

Disregarding Article 881.2 infects the plea process with uncertainty, jeopardizing the finality of valid plea agreements. The critical nature of plea agreements to our criminal justice system has been recognized by the United States Supreme Court:

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings. These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality.

Blackledge v. Allison, 431 U.S. 63; 97 S. Ct. 1621, 1627-28; 52 L.Ed.2d 136 (1977) (citations omitted). Article 881.2 serves this need for finality and should not be disregarded.

Although it should not be reviewed because the plea agreement is unchallenged, the 60-year sentence is constitutional. The majority's finding of excessiveness is based upon "defendant's non-violent and sporadic criminal history" and the "small quantities of cocaine" involved in the subject transactions. This attempts to deflect from the violence long associated with drug culture and, particularly, illegal drug trafficking. In 1991, Justice Kennedy described the problem:

> Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population. Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.
>
> Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs;

> and (3) A violent crime may occur as part of the drug business or culture. *See* Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence 16, 24-36 (N. Weiner & M. Wolfgang eds. 1989). Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence. To mention but a few examples, 57 percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. National Institute of Justice, 1989 Drug Use Forecasting Annual Report 9 (June 1990). The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively.

Harmelin v. Michigan, 501 U.S. 957, 1002-03; 111 S. Ct. 2680, 2705-06; 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring) (some citations and internal quotation marks omitted). These facts have not changed, only our tolerance for them. In fact, a cursory review of reported cases in recent months demonstrates how quickly a "non-violent" drug crime can end in tragedy. *See State v. Welch*, 19-0826, (La. App. 1 Cir. 2/21/20); 297 So. 3d 23 (defendant shot victim in head during dispute over drug sale proceeds); *State v. Newman*, 19-0361 (La. App. 1 Cir. 9/27/19); 289 So. 3d 59, *writ denied*, 19-01890 (La. 1/28/20); 291 So. 3d 1060 (defendant fatally shot victim who allegedly produced a knife during drug transaction); *State v. Hopkins*, 52,660 (La. App. 2 Cir. 4/10/19); 268 So. 3d 1226, 1228, *writ denied*, 19-00841 (La. 9/24/19); 278 So. 3d 978 (defendant shot and killed victim on way to drug exchange).

Defendant's drug dealing touches three decades. His career in crime is reflected in convictions for distribution of cocaine in 1993, possession of cocaine in 1995, attempted possession of cocaine with intent to distribute in 2004 (pled down from the charge of possession of cocaine with intent to distribute), and possession and distribution of cocaine in 2015. His last conviction carried the promise of fourth felony offender status and a mandatory life sentence without the benefit of parole, probation, or suspension of sentence. *See* La. R.S. 15:529.1A(4)(b) (prior to Acts 2017, No. 282). Facing this, defendant admitted being a second felony offender in

exchange for a 60-year sentence, with parole eligibility after only two years.[2] The sentence as part of that bargain is not unconstitutionally excessive, and I would not disturb it.

[2] At sentencing, La. R.S. 40:967B(4)(b) restricted parole eligibility for two years for a conviction of distribution of cocaine. Because the habitual offender statute does not limit parole eligibility for a second-offense felony offender, the parole restriction on the underlying sentence applies to the enhanced sentence. *See* La. R.S. 15:529.1A(1) and G; *State v. Tate*, 99-1483 (La. 11/24/99), 747 So. 2d 519, 520 (*per curiam*).